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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DENNIS CHANG, Plaintiff and Appellant, v. HENRY WEI, Defendant and Respondent.	B203212 (Los Angeles County Super. Ct. No. BC343465)

APPEAL from an order of the Superior Court of Los Angeles County, David L. Minning, Judge. Reversed.

Law Offices of Lawrence M. Markey, Jr., and Lawrence M. Markey, Jr., for Plaintiff and Appellant.

Law Offices of Ricky W. Poon and Ricky W. Poon for Defendant and Respondent.

INTRODUCTION

This is the second appeal in this action for specific performance instituted by plaintiff Dennis Chang (Chang) against defendant Henry Wei (Wei). In the first appeal, this Division unconditionally affirmed a default judgment entered against Wei. (*Chang v. Wei* (June 14, 2007, B192902) [nonpub. opn.] (*Chang I*).) After we issued our remittitur, Wei successfully moved the trial court for relief from the default judgment and to compel arbitration.

In this appeal from the order vacating the default judgment, Chang contends (1) once the remittitur issued, the trial court could not substantively amend, modify or vacate the default judgment; (2) if Wei's post-appeal motion for relief from default could have been reviewed on its merits, the court should have denied the motion, in that there is no legal authority supporting the relief requested; and (3) Wei waived his right to compel arbitration by failing to seek arbitration in a timely fashion. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

As detailed in *Chang I*, "Wei is the owner of record of a single family dwelling located on Emery Street in El Monte. He is a resident of the Dominican Republic or Taiwan, China. Wei leased the residence to a series of renters over the years.

"In August 2003 Wei agreed to sell the real property to [] Chang for $218,000. The transaction was never consummated. In June 2004 Chang filed an action against Wei for specific performance of the real estate contract, among other claims. Wei cross-complained for unjust enrichment, rescission, trespass and conversion.

"The matter came to trial on September 9, 2005. After delivering opening statements the parties requested a recess to discuss settlement. During the recess the parties reached a settlement. With the assistance of counsel and a Chinese interpreter the parties recited the terms of their agreement in open court for the record. The parties agreed to complete the real estate transaction at a compromised price of $300,000. The

parties executed a new purchase and sales agreement and specified escrow would be completed within 45 days. The parties agreed to dismiss the current case with prejudice. They also agreed to dismiss two other pending cases involving the same parties and other defendants. Finally, the parties agreed to execute mutual releases of all defendants and cross-defendants, with the exception being a claim Chang had against Wei's attorney in the matter and his current attorney, Ricky W. Poon. The parties informed the court they agreed the settlement would be 'enforceable under [section] 664.6 of the Code of Civil Procedure. And the parties would expressly agree that even in the case of a dismissal that the court would retain jurisdiction to enforce the settlement.'

"Escrow opened and Chang deposited $7,000 in escrow as specified in the agreement. Escrow was to close in late October 2005, but did not. Each side faulted the other for alleged failures to satisfy conditions or proposed conditions. Wei had agreed to a short extension of time the lending company had requested to close escrow. Wei, however, apparently imposed numerous conditions on his approval to the extension to which Chang did not agree. When Chang's loan funded a few days beyond the extended date, Wei refused to proceed with the sale.

"On November 22, 2005 Chang brought suit against Wei for specific performance of the settlement agreement the parties agreed to in open court on September 9, 2005.

"Chang recorded a 'Notice of Pendency of Action' against the property on November 29, 2005. Chang's counsel filed a declaration stating Chang did not know and could not locate Wei's current address. On the purchase and sales agreement Wei had left the address portion of the contract blank. Chang's counsel filed a declaration stating he had performed a 'reasonably diligent' search to obtain Wei's current address. Specifically, Chang's counsel conducted an internet search for public information connecting Wei to the property on Emery Street. On November 16, 2005 Fidelity National Title Company sent a facsimile transmission to Chang's counsel of a Los Angeles County property record effective July 1, 2005. The report indicated Wei was the owner of record of the residence on Emery Street in El Monte. The report provided a mailing address for Wei of 324 S. Diamond Bar Boulevard, #201, Diamond Bar,

California 91765. This apparently was the address used by the Los Angeles County Tax Assessor's office to mail Wei property tax statements for the property at issue in this case.[1]

"Chang hired a process server to serve Wei at the Diamond Bar address. Between December 28, 2005 and January 3, 2006 the process server made four attempts to personally serve Wei at the location, to no avail. The Diamond Bar address is apparently a commercial enterprise which provides, among other services, private mail boxes. On the process server's fourth attempt the process server served a Mr. Frank Lew with the summons and complaint and notice of lis pendens. According to the process server's declaration, Mr. Lew identified himself as the person in charge of the facility, authorized to accept service on Wei's behalf.

"Thereafter, Chang mailed copies of the summons and complaint to Wei at the Diamond Bar address. Chang also sent copies of the summons, complaint and notice of lis pendens to former counsel Domino Wang and current counsel Ricky W. Poon with a cover letter requesting counsel to consult with Wei to confirm their authority to accept service on his behalf. Chang filed his declaration of diligence and proof of substitute service with the court in January 2006.

"Wei did not respond and on March 20, 2006 Chang filed a request for entry of default. The request for entry of default was mailed to Wei at the Diamond Bar address. In June 2006 the court entered default judgment against Wei. Chang prepared a conditional judgment for specific performance which the court signed and entered on July 12, 2006.[2]

"[1] Chang performed a second search of public records in July 2006 and information provided by the Los Angeles County Assessor's Office indicated the Diamond Bar address was still Wei's mailing and billing address for property tax statements for this property."

2 The judgment in pertinent part stated, "This action for specific performance was filed on November 22, 2005. Defendant was properly served with a copy of the summons and complaint. Defendant failed to answer the complaint or appear and defend

"On July 11, 2006 Wei, though his counsel Ricky W. Poon, specially appeared to challenge the court's jurisdiction. He filed a motion to quash service of the summons and complaint and to vacate the default and default judgment for lack of personal jurisdiction [(pre-appeal motion)]. In his motion, Wei argued he had not been in California or the United States since January 2006 and he had not been served with notice of the proceedings in either the Dominican Republic or Taiwan, China. Wei did not provide his current residence address in either the Dominican Republic or Taiwan. Wei's motion was scheduled to be heard on August 14, 2006.

"Chang mailed notice of entry of judgment on July 27, 2006. On July 31, 2006 Wei moved ex parte for an order shortening time to hear his motion to quash/motion to vacate the default judgment and for a stay of the judgment. Wei filed a declaration in support of his request to shorten time stating he had not been in California or the United States since Chang filed his complaint in November 2005, he had not been served with the summons and complaint, the judgment taken against him was void for lack of personal jurisdiction, and he was at risk of losing his property without due process of law unless the court immediately stayed execution of the judgment.

"At the hearing on July 31, 2006 Chang opposed Wei's motion to shorten time, pointing out Wei's motion to quash was scheduled to be heard in just a few weeks and, in any event, lacked merit. The court informed Wei it could not resolve complex issues of jurisdiction on an ex parte motion. Because the matter was already set for a full hearing the court denied Wei's request to shorten time and for a stay.

"On the same date, July 31, 2006, Wei filed a notice of appeal from the default judgment and from the court's denial of his ex parte request to shorten time to hear his motion to quash and/or for a stay of the judgment.

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the action within the time allowed by law. On March 20, 2006, Defendant had his default entered by the clerk upon the Plaintiff's application. The court considered Plaintiff's written declaration (Code Civ. Proc., sec 585(d))."

"In the meantime Chang filed opposition to Wei's motion to quash, including declarations of counsel explaining the due diligence he undertook to discover Wei's address. Wei filed a reply and included a declaration from Wei stating he did not own the facility in Diamond Bar, did not conduct business at the Diamond Bar address, had never rented a mail box at the commercial mail box facility at the Diamond Bar address, and counsel's representation terminated at the conclusion of the prior matters and they were not authorized to accept service on his behalf.

"At the scheduled hearing on August 14, 2006 the court learned Wei had already filed a notice of appeal from the judgment. The court thus denied his motion to quash/vacate the judgment on the ground Wei's filing of a notice of appeal deprived the court of jurisdiction to hear his motion." (*Chang I*, *supra*, B192902, at pp. 2-5, fn. omitted.)[3]

On June 14, 2007, this Division issued its decision affirming the default judgment entered on July 12, 2006. Wei argued that the trial court lacked jurisdiction to enter the default judgment against him, in that Chang never served him with the summons and complaint. Wei asked this court to review the merits of his motion to quash and to vacate the default judgment as void. We declined to do so, noting that our purpose was to review for trial court error, not to usurp the fact-finding function of the trial court. More fundamentally, we noted that our jurisdiction only extended to the orders or judgments enumerated in Wei's notice of appeal. Since Wei's July 31, 2006 notice of appeal only referred to the default judgment and to the court's July 31, 2006 order denying his request to shorten time and/or to stay the proceedings, we concluded that we lacked jurisdiction to review rulings occurring after the filing of the notice of appeal. The propriety of the trial court's August 14, 2006 order taking the matter off calendar, therefore, was not before us. (*Chang I*, *supra*, B192902, at pp. 6-7.)

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[3] Actually, the trial court took Wei's motion off calendar and thus did not rule on the motion.

With regard to the default judgment, we observed that the record in existence at the time the trial court entered the default judgment "contained evidence of the parties' settlement agreement and a copy of the parties' purchase and sales agreement based on this settlement agreement, in addition to Chang's complaint for specific performance. Also before the court was Chang's counsel's declaration Wei's current address was unknown and a proof of service stating a process server had served the summons, complaint and a copy of the lis pendens on Wei by substituted service on the person in charge of his usual place of business. The filing of the proof of service created a rebuttable presumption service was proper. Because there was no apparent invalidity on the face of the proof of service, and no challenge to the validity of this mode of service on Wei at that time, the trial court properly entered the default judgment as requested." (*Chang I*, *supra*, B192902, at p. 8, fns. omitted.) Finally, we concluded that the order denying Wei's ex parte request to shorten time to hear his motion to quash and/or for a stay of enforcement of the judgment was not appealable. (*Ibid*.)

Following issuance of the remittitur on August 16, 2007, the matter was returned to the trial court where, on August 17, Wei filed a "Supplemental Notice of Motion and Motion for Order for relief from Default and Default Judgment and in its Alternative to Quash Purported Service of Summons and Complaint and to Vacate and Dismiss the Complaint, for Lack of Person Jurisdiction and Subject Matter Jurisdiction" (post-appeal motion). Wei also filed a petition for an order compelling arbitration and to stay the action pending arbitration. Both the post-appeal motion and petition noted that Wei's attorneys were making special appearances. Wei's post-appeal motion was made pursuant to Code of Civil Procedure sections 413.10, subdivision (c), 415.20 and 418.10, and 473 through 473.5. Wei made the motion "on the grounds that neither personal service nor legally sufficient substituted service was effected upon the foreign Defendant Wei."

Therein, Wei asked the trial court "to hear the motion which was taken off calendar on 8/14/06" and stated that he hereby "submit[ted] his supplemental brief for the

instant motion for orders to vacate, set aside, and dismiss the complaint, and any other subsequent default, order, and judgment."

On October 10, 2007, the trial court held a hearing on Wei's post-appeal motion and petition. At the outset, the trial court asked Wei's attorney, Ricky W. Poon, if he was making a "general appearance on behalf of Mr. Wei?" Attorney Poon responded, "Yes, at this point I am." Counsel further stated he would accept service on behalf of Wei.

The trial court then noted that "there is some merit in the defendant's position," and it announced that its tentative decision "would be to grant the relief from the default and to order this matter to arbitration." After entertaining the arguments of counsel, the trial court granted Wei relief from default and ordered the parties to arbitrate their dispute in accordance with the arbitration clause contained in their escrow agreement. The court further rejected Chang's argument it was reversible error to vacate the judgment which was final. The court opted to take that chance stating it "seem[s] to me public policy takes the position the parties, if there is a legally viable way to get together and resolve their differences, they ought to be given the opportunity to do so."

DISCUSSION

Citing *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688 (*Griset II*), Chang contends that this Division's unqualified affirmance of the default judgment in *Chang I* divested the lower court of jurisdiction to amend, modify or vacate the default judgment substantively or to compel arbitration. We agree.

In *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851 (*Griset I*), the trial court "found [Government Code] section 84305 unconstitutional in prohibiting anonymous mass mailings by individuals or committees other than candidate and candidate-controlled committees during an election campaign, but constitutional in prohibiting anonymous mass mailings by candidates and candidate-controlled committees." (*Griset II*, *supra*, 25 Cal.4th at p. 693.) The Supreme Court affirmed the decision of the Court of Appeal. Although the state's high court agreed that Government

Code section 84305 was constitutional as to candidate Griset and two committees he controlled, it did not express any view as to the validity of section 84305 as applied to persons and entities other than candidates and the committees they controlled. (*Id.* at p. 694; *Griset I*, *supra*, at p. 855.)

After the remittitur issued in *Griset I* and the United States Supreme Court denied the plaintiffs' petition for writ of certiorari, the plaintiffs, in the very same action, asked the superior court to declare Government Code section 84305 unconstitutional for a second time. (*Griset II*, *supra*, 25 Cal.4th at p. 692.) The trial court denied plaintiffs' request and entered judgment in favor of defendant. On appeal, however, the Court of Appeal held that Government Code section 84305 was unconstitutional in its entirety and reversed the trial court. (*Ibid*.)

In *Griset II*, the Supreme Court concluded that the judgment it affirmed in *Griset I* was a final judgment disposing of all issues between the parties, in that "it completely resolved plaintiffs' allegation—essential to all of plaintiffs' causes of action—that [Government Code] section 84305 was unconstitutional." (*Griset II*, *supra*, 25 Cal.4th at p. 699.) Observing that the trial court had attempted to reexamine the decision in *Griset I* in reliance "on the 'intervening change in controlling law' exception to the doctrine of law of the case, as well as on a similar exception to the doctrines of res judicata and collateral estoppel" (*id*. at p. 701), the Supreme Court noted that once the decision in *Griset I* became final, it "terminated this litigation as to all causes of action in plaintiffs' complaint. Because plaintiffs thereafter did not commence a separate lawsuit, but instead improperly sought to revive this litigation after its final conclusion, there was no pending legal proceeding to which the above mentioned doctrines or their exceptions properly could be applied. And because *Griset I* resulted in affirmance of the trial court's final judgment in this proceeding, the Court of Appeal erred in holding that it had authority to entertain a second appeal in the same action concerning the merits of plaintiffs' causes of action." (*Griset II*, *supra*, 25 Cal.4th at p. 702.)

In Chang's view, *Griset II* compels the conclusion in this case that our affirmance of the default judgment in *Chang I* precluded the trial court from vacating the judgment following issuance of the remittitur. We agree.

A default judgment entered against a defendant over whom the court lacks personal jurisdiction is void and may be challenged directly or collaterally. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) When a default judgment is attacked directly, extrinsic evidence—i.e., evidence outside the judgment roll—may be used to demonstrate lack of personal jurisdiction and that the judgment valid on its fact is in fact void. (*Strathvale Holdings, supra*, at p. 1249.) In contrast, a collateral attack is limited to the judgment roll which is comprised of "the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." (Code Civ. Proc., § 670, subd. (a); accord, *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1049; *In re Behymer* (1933) 130 Cal.App. 200, 202.) If an inspection of the judgment roll reveals the judgment's invalidity, it is void on its face. A judgment may, however, be facially valid and void nonetheless for lack of proper service. That is Wei's position here.

In *Chang I*, Wei directly attacked the default judgment via his pre-appeal motion to quash service of process and to vacate the default and default judgment and supported that motion with extrinsic evidence. (*Strathvale Holdings v. E.B.H.*, *supra*, 126 Cal.App.4th at p. 1249.) Before the hearing date on the motion, however, Wei filed a notice of appeal from the judgment despite the fact that he would have had ample time to file a notice of appeal following a hearing on his motion. When Wei's motion came on for hearing, the trial court concluded that the notice of appeal deprived it of jurisdiction to rule on the motion and took it off calendar. Rather than voluntarily abandoning his appeal so that the jurisdictional issue could be resolved by way of a *direct* challenge, Wei pursued his appeal from the default judgment to completion. In addition, Wei did not appeal from the post-judgment order taking his pre-appeal motion off calendar.

We affirmed the default judgment ordering specific performance and containing the trial court's express determination that "[Chang] made due service of process on [Wei]." We specifically observed that before the court at the time default judgment was entered was "Chang's counsel's declaration Wei's current address was unknown and a proof of service stating a process server had served the summons, complaint and a copy of the lis pendens on Wei by substituted service on the person in charge of his usual place of business. The filing of the proof of service created a rebuttable presumption service was proper." (*Chang I*, *supra*, B192902, at p. 8, fns. omitted.) Inasmuch as "there was no apparent invalidity on the face of the proof of service, and no challenge to the validity of this mode of service on Wei" at the time the default judgment was entered, "the trial court properly entered the default judgment as requested." (*Chang I*, *supra*, B192902, at p. 8.)

The default judgment from which Wei appealed completely disposed of Chang's specific performance claim against Wei. Once our unqualified affirmance of that default judgment became final, this litigation effectively ended. As such, there was no pending legal proceeding in which the trial court could entertain Wei's post-appeal motion after the remittitur issued. Consequently, Wei could not revive this litigation with his motion, and the trial court was without authority to entertain Wei's post-appeal motion and to vacate the default judgment. (*Griset II*, *supra*, 25 Cal.4th at p. 702.) The order vacating the default judgment thus was void, and our jurisdiction is limited to reversing the trial court's void order. (*Id*. at p. 701.) In light of our conclusion, we need not and do not address Chang's remaining contentions. Whether or in what manner Wei in the future may challenge the default judgment on the ground that it is void for lack of personal jurisdiction due to improper service is a question about which we express no opinion.

DISPOSITION

The order is reversed. Chang is awarded his costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.